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In the Supreme Court of the United States

OCTOBER TERM, 1979

BENNIE CARTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 613 F. 2d 256.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1979. A petition for rehearing was denied on March 5, 1980 (Pet. App. B). The petition for a writ of certiorari was filed on April 17, 1980, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was a prejudicial variance between the single conspiracy alleged in the indictment and the proof at trial.

2. Whether the jury-selection plan of the United States District Court for the Eastern District of Oklahoma deprived petitioners of a jury drawn from a fair cross section of the community in violation of the Jury Selection and Service Act of 1968 or the Constitution.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Oklahoma, all petitioners were convicted of conspiracy to manufacture, to possess with intent to distribute and to distribute marijuana, in violation of 21 U.S.C. 846 (Count I). Petitioner Clifton Carter was also convicted of five counts of possession of marijuana, in violation of 21 U.S.C. 841(a)(1) (Counts XII-XVI). Clifton Carter was sentenced to consecutive terms of five years' imprisonment and two years' special parole on Counts I and XII and to a general five-year sentence on Counts XIII through XVI to be followed by two years' special parole, to run concurrently with the sentence imposed on Count I, for a total of 10 years' imprisonment. Bennie Carter was sentenced to three years' imprisonment to be followed by a special parole term of two years. Edward, Lynette, Mary Jane and Tommy Carter each received a suspended sentence and three years' probation.

Petitioners were indicted in a 16-count indictment that charged 36 defendants with conspiracy and substantive offenses relating to marijuana cultivation and trafficking. Twelve of the defendants were tried in April 1978. Of these 12, dismissals were granted as to two, three were acquitted, and seven, including the six petitioners,[1] were

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[1]The seventh defendant, Chuck Sweeten, was acquitted on the conspiracy count and convicted on the substantive count of possession with intent to distribute. Sweeten's conviction was affirmed on appeal, but he does not now join in the petition for certiorari in the instant case.

found guilty. A subsequent trial of nine of the remaining co-defendants ended in a mistrial and eventual dismissal of Count I. See *United States* v. *Bowline*, 593 F. 2d 944 (10th Cir. 1979).

The evidence adduced at petitioners' trial showed that during the summer of 1976 Clifton Carter purchased large quantities of marijuana from Ralph Patty and James Earl Cook, who had cultivated the crop on their lands in McCurtain County, Oklahoma (Tr. 18-19). In February and March of 1977, Clifton Carter agreed with Cook and Patty that he would assist in planting marijuana on their lands in return for one-fourth of the proceeds (Tr. 28-31, 217, 467).

As a result, Clifton, Bennie, Tommy and Edward Carter[2] assisted in planting the marijuana that spring and in its cultivation through July 1977 (Tr. 31-34, 215, 218, 365-367, 456-457, 576-577). In early July, however, as a result of a tip about an impending raid, Clifton, Bennie, Tommy, Edward and others quickly harvested the marijuana on the Patty and Cook property and carried it away for processing (Tr. 38-43, 220-225, 367-369, 457-459, 577-579). Lynette was present during the harvesting (Tr. 139, 460).

In the meantime, from January 1977 to September 1977 the co-conspirators made approximately 18 trips from McCurtain County to Edinburg, Texas, to buy more marijuana for distribution to the several customers who came to McCurtain County to buy marijuana from the Carter enterprise. On the majority of these trips Clifton Carter provided cash to purchase marijuana and paid the driver for delivering the loads to the Carters in McCurtain

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[2]Petitioner Mary Jane is Clifton Carter's wife; petitioner Lynette is Bennie Carter's wife. Petitioners Bennie, Tommy and Edward are Clifton Carter's sons.

County (Tr. 25-27, 228, 374, 378-379). In April or May 1977 two other co-conspirators received money from Clifton Carter and drove to Edinburg, Texas, where they purchased 200 pounds of marijuana. Upon their return to the Cook residence in McCurtain County, they delivered the marijuana to Mary Jane and Lynette Carter, who paid them $1,000 (Tr. 228-229, 371). Clifton Carter went back to Texas again to buy more marijuana in June or July 1977 (Tr. 371-372). On several occasions Bennie Carter furnished part of the cash to buy the marijuana (Tr. 27).

ARGUMENT

1. Petitioners contend (Pet. 7) that a variance existed between the indictment and the proof at trial. Although Count I of the indictment charged one conspiracy to manufacture, possess and distribute marijuana, petitioners contend that the government introduced evidence of several conspiracies, thereby prejudicing those petitioners who were not involved in each one of the various conspiracies. In support of this contention petitioners rely on *United States* v. *Bowline*, 593 F. 2d 944 (10th Cir. 1979), in which the court of appeals affirmed the district court's dismissal, in a related trial of severed co-defendants who were purchasers of the marijuana from petitioners, of the same conspiracy count under which petitioners were indicted. The district court in *Bowline* held that dismissal was appropriate because one conspiracy was alleged and three conspiracies were proven,[3] and the evidence showed that not all the defendants participated in each of the separate conspiracies; indeed,

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[3]In *Bowline* the district court found Count I of the indictment in reality charged three conspiracies as against the defendants in that trial: a main conspiracy to cultivate and sell the 1976 crop on the Cook and Patty property, a second conspiracy to plant and cultivate a fresh crop in 1977, and a third conspiracy to purchase marijuana and transport it from Edinburg, Texas, to Oklahoma.

some of the defendants in that case had not participated in any of the conspiracies but were charged under separate substantive counts. The court of appeals agreed that the factual similarity between the *Bowline* case and *Kotteakos* v. *United States*, 328 U.S. 750 (1946), required a dismissal. Petitioners argue that since the *Bowline* court found the indictment and resulting variance was prejudicial as against the defendants in that case, the indictment must have resulted in a prejudicial variance in petitioners' case. This argument was rejected by the court of appeals, on whose opinion we principally rely.

The court in *Bowline* found a variance because "the several defendants at trial were a mixed group, some of whom had participated in one or more of the conspiracies, but many of whom had not participated in some of the conspiracies and thus all were subjected to prejudice as a result of being tried in an atmosphere where the acts and conspiracies of others were introduced" (593 F. 2d at 947). The court made specifically clear, however, that the dismissal was not applicable to petitioners in the instant case, who were tried separately (*id.* at 947 n.1).

The court of appeals in the instant case correctly concluded (Pet. App. 11-12) that no variance was present. In contrast to *Bowline*, where the defendants were the customers who bought marijuana at the farm and were not aware of the various facets of the conspiracy, the evidence in petitioners' trial revealed that each was a participant in every aspect of the overall conspiracy to raise and distribute marijuana as alleged in Count 1. Clifton, Bennie, Edward Lee, and Tommy Carter participated in the cultivation, harvest, and transportation of the marijuana (*id.* at 12). Lynette was present in the marijuana fields during the July harvest (*ibid.*). Both Mary Jane and Lynette received a load of marijuana that

was trucked in from Texas (*ibid.*). Bennie and Clifton furnished money to purchase the marijuana in Texas, and other family members were present during discussions of the trips to Texas. As the court of appeals concluded (*id.* at 13), "[t]his does not resemble in any way the circumstances dealt with in *Kotteakos* v. *United States*, 328 U.S. 750."[4]

2. Petitioners next contend (Pet. 7) that the jury-selection plan of the United States District Court for the Eastern District of Oklahoma, which divides the Eastern District into two divisions, deprived them of a jury drawn from a fair cross section of the community, in violation of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, because they were tried in a division that did not include McCurtain County, their home. However, petitioners never raised this issue in the courts below, and therefore neither the district court nor the court of appeals addressed it. A claim under the Act must be raised before the voir dire examination of jurors commences (28 U.S.C. 1867(a)), and petitioners' failure to raise the claim in timely fashion forecloses its consideration when presented for the first time in this Court (28 U.S.C. 1867(e)).

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[4]*Kotteakos* reversed conspiracy convictions where the government charged a single conspiracy, the trial judge instructed the jury on the theory of a single conspiracy, but the proof was insufficient to prove a single conspiracy. All that had been proven were smaller conspiracies that happened to involve a common figure. The court held that the variance was prejudicial to Kotteakos, who was a peripheral figure. 328 U.S. at 768-769, 774. Since there was no variance in this case, it is unnecessary to consider whether a variance would have been prejudicial. 28 U.S.C. 2111.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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